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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

JOHN T. SCOTT III  
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**February 16, 1995**

**DOCKET FILE COPY ORIGINAL**

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

**Re: PR Docket No. 94-106**

**Dear Mr. Caton:**

Transmitted herewith for filing with the Commission on behalf of the Bell Atlantic Metro Mobile Companies are an original and four copies of their "Application for Review" of two Orders of the Commission Staff in this proceeding (DA 95-111 and DA 95-208).

Should there be any questions regarding this matter, please communicate with this office.

**Very truly yours,**

*John T. Scott, III*

**John T. Scott, III**

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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEB 16 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Petition of the Connecticut Department  
of Public Utility Control to Retain  
Regulatory Control of the Rates of  
Wholesale Cellular Service Providers  
in the State of Connecticut

)  
)  
) PR Docket No. 94-106  
)  
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DOCKET FILE COPY ORIGINAL

To: The Commission

APPLICATION FOR REVIEW

The Bell Atlantic Metro Mobile Companies (BAMM), by their attorneys and pursuant to Section 1.115 of the Commission's Rules, hereby seek review of two Orders of the Chief, Wireless Telecommunications Bureau, released January 25, 1995 (DA 95-111) ("First Confidentiality Order") and February 9, 1995 (DA 95-208) ("Second Confidentiality Order"). The Orders are in conflict with Commission Rules and policy, and also constitute prejudicial procedural error. See Section 1.115(b)(2).

I. SUMMARY

This proceeding concerns the petition of the Connecticut Department of Public Utilities (DPUC) to retain authority under Section 332(c)(3) of the Communications Act to regulate wholesale rates for cellular carriers. BAMM provides cellular telephone service to subscribers in Connecticut, and is a party to this

proceeding. It seeks review only of the portions of the Orders which address the Connecticut proceeding (PR Docket No. 94-106).

The Orders are unlawful on three counts. First, they wrongly grant an ex parte motion filed by the DPUC, and admit portions of the DPUC's own record into the Commission's record, even though the material was available when the DPUC filed its petition six months ago and even though the DPUC conceded that its own record was inconclusive on key issues. Second, the Orders make decisions on admitting certain materials which appear to be arbitrary as well as prejudicial in favor of the DPUC. Third, they schedule still another comment period in violation of Section 20.13 of the Commission's Rules. For each of these reasons, the Orders should be reversed, the DPUC's motion denied, and the new comment period rescinded.<sup>1/</sup>

## II. ARGUMENT

### A. The DPUC's Motion Should Have Been Denied.

On January 20, 1995, the Commission received from the DPUC a "Motion for Leave to Accept Record and Request for Confidential Treatment." First Confidentiality Order at ¶ 5 n. 8. No certifi-

<sup>1/</sup>

The First Confidentiality Order accepted the DPUC's submission but stated it would consider the DPUC's confidentiality request in a later order. The time for seeking reconsideration or review of the First Confidentiality Order (see Sections 1.106 and 1.115) has not yet expired. The Second Confidentiality Order acts on the confidentiality request, and further requires that applications for review be filed by February 16, 1995. To comply with this deadline, but avoid burdening Commission staff with multiple filings, BAMM is combining its appeals from both orders into this application for review.

cate of service accompanied the motion, nor did BMM ever receive it from the DPUC. The motion was thus ex parte, in violation of Commission Rules, and should have been denied on this ground.<sup>2/</sup> Instead, the motion was granted without explanation. The Orders did not address the ex parte issue or justify grant of the motion, and thus failed to provide the reasoned basis required by law.

The DPUC's motion should also have been rejected because it was untimely and in conflict with the Commission's Rules for state petitions. In the Second Report and Order in CC Docket No. 93-252, 9 FCC Rcd. 1411 (1994), the Commission adopted a detailed rule to govern state petitions to regulate CMRS rates, Section 20.13. That rule sets specific comment periods: Parties have 30 days to comment on a state petition, and replies may be filed 15 days thereafter. "No additional pleadings may be filed." Section 20.13(a)(5) (emphasis added). Again, the Commission Orders erroneously fail to address what should have been a fatal defect.<sup>3/</sup>

The DPUC's only basis for the motion is the conclusory claim that the materials are "essential for the full and complete

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<sup>2/</sup> Upon learning of the DPUC's motion for the first time in the First Confidentiality Order, BMM contacted Commission staff about an opportunity to respond. BMM was advised that it should await issuance of a further order and at that time raise its concerns about the motion.

<sup>3/</sup> The Commission has stressed the importance of compliance with its rules and procedures. E.g., Time-Life Broadcast, Inc., 33 FCC2d 1099 (1972) (accepting a late-filed pleading would be "serving notice that the Commission's procedures and orders can effectively be ignored."). The courts have approved dismissal of unauthorized pleadings because of the importance of "orderliness and predictability (and finality) to the litigation process." Llerandi v. FCC, 863 F.2d 79, 87 (D.C.Cir. 1988). As that court observed, "rules are rules." Id. The Orders here depart from these important principles.

deliberation of the issues presented by the Department's petition in this docket." However, all of the materials were available before the DPUC filed its petition on August 8, 1994, and could have been submitted as part of that petition. This would have given parties the opportunity to comment on the submissions, if warranted, during the required comment period, which closed October 19, 1994. If the materials were, as the DPUC claims, so "essential," the DPUC advances no reason why they were not filed with its September 1994 petition.<sup>4/</sup>

Finally, the DPUC's filing should have been denied because in its own proceeding on whether to continue wholesale cellular rate regulation, the DPUC conceded that its record was "inconclusive" on the central issue as to whether cellular carriers were earning excessive rates of return. Instead, the DPUC decided it needed to conduct a future proceeding to develop additional data. Decision at 11. For this reason, as BMM and other parties have argued, this Commission need not look at the DPUC's record at all.<sup>5/</sup>

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<sup>4/</sup> Commission Staff may have assumed that since it was accepting materials from the record of the California state proceeding, similar treatment for Connecticut was warranted. But, in sharp contrast to Connecticut, the California materials at issue were filed with the original California petition and oppositions to that petition. Second Confidentiality Order at ¶ 4. Here, however, one party is seeking to introduce materials to support its case six months after it could have done so.

<sup>5/</sup> See, e.g., Comments of BMM at 11-15. As BMM and others argued, the DPUC record demonstrates (if anything) that carriers are earning no more than competitive rates of return, and in any event contains nothing to show that wholesale rate regulation is protecting consumers, as Section 332(c)(3) requires. But the Commission need go no farther than to acknowledge the DPUC's own decision that the record was at best inconclusive. Because the DPUC has the burden of proof to sustain continued rate regulation under Section 20.13(a),

The DPUC's finding that the evidence was inconclusive is determinative under Section 332(c)(3) of the Communications Act and Section 20.13(a) of the Commission's Rules, because under that law the DPUC bears the burden of proof. Its own record shows that burden cannot be met. Considering the DPUC's record would not only serve no purpose but would conflict with the Act and the Commission's Rules for these proceedings.

B. The Selective Treatment of the DPUC Record  
Appears Both Arbitrary and Prejudicial.

The Second Confidentiality Order addresses the DPUC's request that the materials be granted confidential treatment. It parses the record, accepting some documents with full public disclosure, accepting others but placing them under a confidentiality order, and rejecting the rest. See Appendix A.

This division appears to be arbitrary in numerous respects. Some parties' briefs are included; others are rejected. For example, the Connecticut Office of Consumer Counsel's reply brief is accepted, but its initial brief is rejected. The treatment of hearing testimony is equally problematic. Nine different portions of the transcript are accepted but the balance is rejected without in some cases any explanation of why these selections were made.

Such selective treatment is particularly improper because Commission Staff took it upon itself to question the DPUC's own confidentiality determinations. For example, many of the sections

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and its own decision recognizes that burden was not met, its petition cannot be granted without violating both Section 332(c)(3) and that Rule.

of the hearing transcript that the Second Confidentiality Order excludes contain confidential financial data, which was properly subject to the DPUC Protective Order. Yet the Staff rejects them for the single reason that they "do not explicitly identify the segments arguably warranting confidential treatment." Second Confidentiality Order at ¶ 14. Such second-guessing of the DPUC's Protective Order was also error.

Commission Staff express understandable frustration with having to parse through all of the submitted documents to make the confidentiality determinations that the DPUC should have made, but notes it was constrained by the statutory deadline for deciding this proceeding. Second Confidentiality Order at ¶ 15. BMM respectfully suggests that Commission staff went off the track in assuming that it should engage in that effort at all. The proper course, given the statutory deadline, would have been to reject the motion and the documents altogether.

BMM is particularly concerned that the selective treatment of materials appears to have been guided by the desire to do the DPUC's work for it. Commission Staff concedes that the DPUC's request was defective under its confidentiality rules, yet nonetheless then tries to cure the defects on its own. This approach raises issues of potential prejudice. Thus the Second Confidentiality Order (¶ 11) accepts certain documents because they "could easily constitute logical and relevant foundations for the arguments they are offered to prove . . . ." In plain terms, materials were accepted based on the Staff's conclusion that they may support the DPUC's case.

In contrast, where the documents cannot be found to advance the DPUC's arguments, they are rejected. There are no findings that, because certain materials may not support the DPUC, but are relevant to the issues the Commission must address under Section 332(c)(3), they should also be considered. For example, the excluded sections of the hearing transcript contain information that confirms cellular carriers were earning competitive rates of return. Yet, merely because Commission Staff could not determine "to what extent Connecticut may have relied on" these materials, they have been excluded from consideration. (Second Confidentiality Order at ¶ 14.) Given the information they contain, it is hardly surprising that the DPUC did not rely on them.

The grave unfairness in this selective approach is that documents are being accepted based not on their impact on an objective analysis, but their "relevance" to one party's position. (Second Confidentiality Order at ¶ 15.) It is up to the parties, not the Commission, to identify the information that they believe support their case. For these reasons, the Second Confidentiality Order creates a serious taint of potential prejudice and should be reversed.

C. The Creation of a New Comment Period is Unlawful.

The Second Confidentiality Order is independently unlawful because it announces a new comment period for this proceeding, with comments on the DPUC's submission to be filed by February 24 and replies by March 3. In opening up this proceeding to a new round of comments, the Second Confidentiality Order violated



Section 20.13 of the Commission's Rules. That section specifies the only comment periods allowed, then states, "No additional pleadings may be filed." The Commission explicitly limited comments because of the tight statutory time frame for reaching a decision.

The Order does not mention Section 20.13, let alone justify why it should be ignored, and thus constitutes arbitrary and capricious agency action.<sup>6/</sup> In any event, given that the material is more than six months old, and could have been introduced by the DPUC or other parties in their comments in this proceeding, there is no apparent reason why there should be still another comment period. This is especially true since the DPUC itself found that the record was inconclusive. Nothing will be gained; instead the Commission and the parties will be further burdened and the outcome of this proceeding further delayed.<sup>7/</sup>

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<sup>6/</sup> See n. 3, *supra*, and cases cited therein.

<sup>7/</sup> The scheduling of a comment period in the California proceeding does not justify a similar comment period on the DPUC's submission. The California documents were filed last August but have been subject to continued litigation over their disclosure. While parties may thus be entitled to an opportunity to comment on those documents now that disclosure issues have been resolved, that rationale does not support a comment period to accommodate Connecticut.

III. CONCLUSION

For these reasons, BAMM asks that the Orders be reversed, that the DPUC's motion be denied, and that the new comment period be rescinded.

Respectfully submitted,

THE BELL ATLANTIC METRO  
MOBILE COMPANIES

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Dated: February 16, 1995

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 16th day of February, 1995, caused copies of the foregoing "Application for Review" of the Bell Atlantic Metro Mobile Companies to be sent by hand delivery (indicated by an \*) or by first class mail to the following:

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